

No. 82-1724

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IN THE

Supreme Court of the United States

October Term, 1982

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER, SUSAN BUTLER,

Respondents.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

**BRIEF OF RESPONDENT SUSAN BUTLER
IN OPPOSITION TO PETITION
FOR CERTIORARI**

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i.

Questions Presented

Respondent Susan Butler adopts the questions as stated in the Brief of Respondent Robert Uplinger.

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Relevant Constitutional and Statutory Material

**UNITED STATES CONSTITUTION,
Amendments I, XIV**

[Please see Petition, page 2, for text.]

NEW YORK STATE PENAL LAW

Sections 240.35-3 (Loitering-for-the-purpose of deviate sex, etc.) and Section 130.38, (Consensual Sodomy). [Please see Petition, page 3, for text.]

Section 130.00 ("Sex offenses: definitions of terms"). [Please see Brief of Respondent Robert Uplinger, page iii.]

Section 240.37. (Loitering-for-the-purpose of prostitution).

"1. For the purposes of this section, 'public place' means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.

"2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of

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the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.

"3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article two hundred thirty of the penal law is guilty of a class A misdemeanor."

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| Pruett v. Texas, <i>id.</i> , Motion to Dismiss, filed March 16, 1971 [Printed, same resource as above]. | 9 |
| Canfield v. Oklahoma, Docket No. 72-6799, Oct. Term, 1973, Jurisdictional Statement, filed May 1973 [Not Printed; filed at U.S. National Archives, Washington, D.C.] | 9 |
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OFFICIAL AND UNOFFICIAL CITATIONS
OF OPINIONS ISSUED BELOW

N.Y. Court of Appeals: *People v. Uplinger*, 58
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(1983)

County Court, Erie County: *People v. Uplinger*, 113
Misc.2d 876, 449 N.Y.S.2d 916 (County Ct. 1982)
Buffalo City Court, Buffalo, N.Y.: *People v. Butler*,
110 Misc.2d 843, 443 N.Y.S.2d 40 (City Ct. 1981)

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Summary of Respondent's Argument

Point I. *People v. Onofre*, 51 N.Y.2d 476 (1980), *cert. den.* 451 U.S. 987 (1981), ruled, *inter alia*, that the New York consensual sodomy statute, Penal Law Section 130.38, was unconstitutional as a violation of the equal protection of the laws, under the United States Constitution, due to its exemption of sodomy conduct from the prohibition when performed between spouses,

while criminalizing that conduct as to all others. Such decision was correct, and, on the basis of the equal protection argument (coupled with the privacy principle enunciated as an independent basis for the holding), provided a clear foundation for the striking down of the statute.

Point II. The *Onofre* decision by the New York Court of Appeals did not contravene any prior determination by this Court, despite the fact that four prior cases facially presenting sodomy privacy issues were summarily disposed of by the Court.

Point III. Given the foundation of the *Onofre* decision, the decision of the Court of Appeals in *People v. Uplinger* and *People v. Butler*, 58 N.Y.2d 936 (1983), was not only predictable but obligatory. The State of New York has not articulated any rational basis for a determination that the loitering-for-deviate-sex provision (Penal Law 240.35-3) should be upheld, notwithstanding the fact that the ultimate object of the loitering was legal and, when done in a private residence, constitutionally protected. Respondent's position results from the fact that the New York Legislature has failed, after *Onofre*, to enact any substitute provision specifically directed to public sex activity while also avoiding the pitfall of violation of equal protection rights.

The Court below has carefully and conservatively ruled in such a way as to preserve to the New York Legislature the power to vindicate any proper public purpose by enacting an appropriate statute designed to proscribe public solicitations for public sex or solicitations for private sex which are in some way actually offensive or harassing. By leaving it to the New York Legislature to determine what kind of proscription

present State authorities wish to impose, within constitutional bounds, the Court has carefully refrained from encroaching on proper legislative powers.

Point IV. Even if the Legislature fails to enact an appropriate substitute statute for either Penal Law Section 130.38 or Section 240.35-3, the State retains the power to charge and convict persons who it claims are engaged in prostitution activities (as claimed by the State below as to Susan Butler) under Penal Law Section 240.37, loitering for the purpose of prostitution. Accordingly, as to respondent Butler, the State has lost nothing by the effects of the decision below, except the opportunity to evade the reasonable and constitutionally appropriate proof requirements of the alternative statutory provision. As a result, the issues in this case, as they apply to Susan Butler, do not present sufficiently important public policy considerations to warrant this Court granting the application for certiorari.

Point V. If, however, the Court elects to grant the petition for certiorari, full argument and hearing of the matter should be provided for, in lieu of any summary determination of the issues. The extent of the power of the states to control private sexual practices among consenting adults, where there is no proof of commerce in sex, is a substantial, unresolved constitutional issue which affects large masses of people, both homosexual and heterosexual, and which needs to be fully reviewed and explicated for the benefit of litigants and courts dealing with the various challenges being made. Additionally, to the extent that the State attempts to uphold the loitering provision, notwithstanding the correctness of the constitutional holdings of *Onofre, supra*, this matter presents, as to the loitering or solicitation aspects only, an opportunity for a further

examination into the rights of the public to use the streets while retaining limited rights of privacy in public-place, but private, conversations with others. [Compare *Kolendar v. Lawson*, _____ U.S. _____, 51 U.S.L.Wk. 4532, No. 81-1320 (1983)].

ARGUMENT

POINT I

People v. Onofre correctly decided the constitutional issues of privacy and equal protection of the laws referred to therein and correctly concluded that the New York consensual sodomy law (Penal Law §130.38) was unconstitutional.

Respondent Butler respectfully refers the Court to Point I of the argument in the Brief of Respondent Robert Uplinger herein (pages 7-10) and adopts that argument for herself.

The *Onofre* decision was based on two alternative grounds: privacy and equal protection. *People v. Onofre, supra* at 485. Only the fact situation presented in Ronald Onofre's appeal directly involved the claim of privacy (although the other defendants argued privacy as well). *Onofre, supra* at 483-484. The remaining defendants were all convicted for alleged sodomous acts performed in motor vehicles on the public streets. *Onofre, supra* at 484. Accordingly, the Court of Appeals elected to rule both on the privacy issue and the equal protection issue, the latter ground being applicable whether the sex acts were in public or in private. (See *People v. Onofre, supra* at 485, note 2.) The decision was clearly correct on both grounds.

Privacy. Griswold v. Connecticut, 381 U.S. 479 (1965), first established the concept of the right of privacy, putting outside the ambit of state control bedroom decisions of married persons, touching the most intimate matters of their lives—whether to have children and how to regulate their sexual conduct with each other. *Id.* 483-485. In *Stanley v. Georgia*, 394 U.S. 557 (1969), the privacy right was recognized to exist with respect to the possession of pornographic materials in one's own home—the right here being based not on the nature of a relationship but on the locus of the activity, the citizen's private residence. *Id.* 564-565.

In *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Roe v. Wade*, 410 U.S. 113 (1973), this Court recognized that the right of privacy extends beyond matrimonial relationships or the private residence of the defendant to certain other important decisions involving sexual and other personal activity of individuals, married or unmarried, in whatever context the case may arise. These decisions are firmly grounded in constitutional history. See, e.g., *Boyd v. United States*, 116 U.S. 616 at 630 (1886), which originally recognized the applicability of the Constitution to protect "the sanctity of a man's home and the privacies of life"; *Union Pacific Railway Co. v. Botford*, 141 U.S. 250 at 251 (1891), emphasizing the "right to one's own person"; *Doe v. Bolton*, 410 U.S. 179 (1973), protecting "freedom of choice in basic decisions of one's life"; *Whalen v. Roe*, 429 U.S. 589 at 599-600 (1977), describing the right as "the interest in independence in making certain kinds of important decisions" and *Carey v. Population Services*, 431 U.S. 678 at 685 (1976), describing the right of privacy as a "field that by definition concerns the most intimate of human activities and relationships, [where] decisions whether to accomplish or prevent contraception are among the most private and sensitive".

The New York courts have properly recognized that, insofar as the right is upheld in cases involving contraceptives, abortion and private possession of pornography, the decisions are in fact upholding the private right of the individual to engage in certain sexual activities, free of the consequence of unwanted pregnancy or government interference. See *People v. Onofre*, *supra* at 488 (protection of "indulgence in acts of sexual intimacy"). There is no rational basis to exclude protection of the decision of what kind of non-harmful, consensual sex act to engage in (here, sodomy, as defined by New York Penal Law, Section 130.00-2) from the range of protection previously upheld by this Court. See *People v. Onofre*, *supra* at 488. Certainly, the experience of sex (quite apart from any rational decisions whether and when to have children) is itself a matter of extreme privacy and intimacy, falling well within the zone of privacy outlined by this Court in its earlier decisions. See Richards, "Sexual Autonomy and Constitutional Right to Privacy", 30 *Hastings Law Journal* 957, 1004-1005 (1979); *Baker v. Wade*, 553 F.Supp. 1121 at 1130 (N.D. Tex. 1982).¹

Equal Protection. Eisenstadt v. Baird, 405 U.S. 438 at 453-54 (1972), found it impossible to make a constitutionally permissible distinction between married people and single people in determining whether or not the right of privacy inhered with respect to sexual matters. Similarly, the Court of Appeals in *Onofre* (51 N.Y.2d, *supra*, at 491-494) found it impossible to distinguish between conduct of married people and single people with respect to the performance of sodomy.

¹ Note reference at page 1130 of the *Baker v. Wade* decision to the basic importance of sex to the individual, being, "next to hunger and thirst, . . . the most powerful drive that human beings experience".

Because the statute made that distinction, it was found to violate rights of equal protection.² The premise was clearly correct, as held by the Court of Appeals, and renders the statute lifeless, whether it would otherwise be applicable in a public or private setting. See, also, *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980); *Baker v. Wade*, *supra* at 1143-1144.

POINT II

The decision in *People v. Onofre* was not precluded by any prior determination of this Court on the merits, although four substantive rulings relating to privacy have occurred.

This Court has ruled substantively in four cases which facially presented the question of the constitutionality of state sodomy laws with respect to the right of privacy. The summary dispositions, however, while finally determining the cases for the litigants and implicitly deciding the questions necessary to be decided for that purpose [see *Mandel v. Bradley*, 432 U.S. 173 at 173-177 (1977); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 at 182-183 (1979)], did not reach the issues which were present in *Onofre*, either as to privacy or equal protection.

² Significantly, Judge Jasen, the lone dissenter in *People v. Uplinger*, below, concurred in the majority opinion in *Onofre* on the equal protection ground, while declining to go along with the majority's holding on the privacy issue. *People v. Onofre*, *supra* at 494. The equal protection argument, under which respondent Butler's acts would still be protected from the statute's impact, is, therefore, arguably even stronger than the personal privacy right argument, which would apply if the loitering charged against her had been for sex contemplated to occur in a private setting.

1. *Doe v. Commonwealth's Attorney for City of Richmond*, 403 F.Supp. 1199 (E.D. Va. 1975), *aff'd* 425 U.S. 901 (1976).

The District Court ruled on the civil declaratory and injunction action brought by two homosexuals suing anonymously to have the Virginia sodomy statute struck down as a violation of their privacy. The District Court held that the statute was constitutional. This Court's summary affirmance was undoubtedly based on applicable justiciability problems involving case and controversy issues and may, further, have been based on standing and abstention issues.³ See *Younger v. Harris*, 401 U.S. 37, 41-42 (1971) and *Boyle v. Landry*, 401 U.S. 77 (1971). See also *Samuels v. Mackell*, 401 U.S. 66 (1971). Compare *Wade v. Buchanan*, 401 U.S. 989 (1971), vacating and remanding judgment in *Buchanan v. Batchelor*, 308 F.Supp. 729 (N.D.Tex. 1970), particularly as the claims of the intervenors in the lower court case were affected. See, also, *People v. Onofre*, *supra* at 493-494; *Baker v. Wade*, *supra*, 553 F.Supp. at 1136-1138.

2. *Pruett v. Texas*, 463 S.W.2d 191 (1971), *dis.* 402 U.S. 902 (1971) [Docket No. 1390, Oct. Term, 1970].

Pruett pleaded guilty to violation of the Texas statute outlawing sodomy,⁴ applicable whether the act was by force or consent and whether done in public or in private. The offense was committed *by force* at a detention school, with the record being silent as to whether or not

³ "Standing" questions involve not only policy issues of self-restraint by this Court in adjudicating constitutional issues. They are also integrally related to jurisdictional questions under the cases and controversies provision of the Constitution. See *Barrows v. Jackson*, 346 U.S. 249 at 255 (1953).

⁴ Texas Penal Code, Article 524, Acts 1860; Acts 1943, 48th Leg., p. 194, ch. 112, Sec. 1.

it occurred in private. The questions presented in Pruett's papers to this Court all related to whether or not the Texas court was bound by the prior decision in *Buchanan v. Batchelor*, *supra*, 308 F.Supp. 729, the appeal from which was then pending before this Court. [See Pruett Juris. St. at 3-4; see, also, Motion to Dismiss at 2, asserting that Pruett's "sole contention" before this Court was based on the allegedly binding nature of the District Court ruling in *Buchanan v. Batchelor*, *supra*, over the Texas court.]⁵

3. *Canfield v. Oklahoma*, 506 P.2d 987 (Okla. Cr. App. 1973), *dis.* 414 U.S. 991 (1973) [Docket No. 72-6799, Oct. Term, 1973].

Canfield was charged with violation of the Oklahoma sodomy statute, which outlawed commission of the "detestable and abominable crime against nature", again without regard to whether the act was done in public or private. Okla. Stat. Ann., 21 O.S. 886. The act was committed in a motor vehicle approximately 100 yards off the public road. *Canfield v. Oklahoma*, *supra*, 506 P.2d at 988. Canfield, among other arguments to this Court, urged that the statute violated his right to privacy. [See Canfield Juris. St. at 2, Question No. 3.]

4. *State v. Poe*, 40 N.C.App. 385, 252 S.E.2d 843 (1979), *cert. den.* 298 N.C. 303, 259 S.E.2d 304 (1979), *dis. sub nom. Poe v. North Carolina*, 445 U.S. 947 (1980) [Docket No. 79-5877, Oct. Term, 1979].

Poe was convicted of violating North Carolina's statute outlawing commission of the "crime against nature", applicable whether the act was in public or in private. N.C.G.S. 14-177. The act took place between Mr. Poe and a woman in an abandoned warehouse where they went

⁵ The *Buchanan v. Batchelor* decision was subsequently vacated and remanded by this Court. See *Wade v. Buchanan*, 401 U.S. 989 (1971).

for that purpose. The record contains no information indicating that the warehouse was not equally as accessible to other members of the public, as it was to Poe and his companion. [See Poe Juris. St. at 2-3.] The sole question presented on the appeal to this Court was whether Poe's right to privacy under the Constitution was violated. [Poe Juris. St. at 2.]

Whereas the *Doe* case was one of summary affirmance of a lower federal court determination, the other three cases all resulted in unexplicated dismissals by this Court for want of a substantial federal question.

None of the earlier cases presented the issues of equal protection under a statute, like New York's, which distinguished facially between permitted and prohibited sex acts between married persons, on the one hand, and unmarried persons, on the other. Clearly, this Court's dismissals did not constitute determinations of the constitutional issue of equal protection, although that was one of the two independent grounds relied upon by the *Onofre* court. *People v. Onofre*, *supra* at 485.

The correct method of constitutional adjudication, where possible, is to limit the adjudication to the statute as applied in a given situation. *Lovelace v. United States*, 357 F.2d 306 at 309 (5th Cir. 1966); *Gibbs v. Blackwell*, 354 F.2d 469 at 471 (5th Cir. 1965); *Sims v. Baggett*, 247 F.Supp. 96 at 101-102 (M.D. Ala. 1965). Moreover, this Court normally will not determine constitutional rights of parties not before the Court on the argument of others whose conduct did not come within the scope of those rights. *Broadrick v. Oklahoma*, 413 U.S. 601 at 610-11 (1973). The facts in none of the earlier cases presented to this Court would bring those litigants within one of the exceptions to the *Broadrick* rule. *Id.* at 611, *et seq.*

Finally, the precedents established by summary dispositions by this Court must be limited to the holding which "was essential to sustain" the judgment appealed from. *Illinois State Board of Elections v. Socialist Workers Party*, *supra* at 183. And the precedential significance of the dismissal is to be evaluated "in the light of all of the facts in that case". *Mandel v. Bradley*, *supra* at 177.

Accordingly, the teaching of the earlier cases is limited, respondent suggests, to the following:

1. Homosexual plaintiffs, living anonymously and under a generalized fear of arrest and prosecution, but with no demonstrably justifiable fear of the same, have no standing to raise the constitutionality issue in a civil action in federal court; if, however, there was imminent fear of arrest and prosecution under a state sodomy statute, *Younger* and *Boyle* abstention problems would generally preclude civil litigation of the issue. *Doe v. Commonwealth*, *supra*.

2. The constitutional right of privacy does not extend to protect one who commits the act of sodomy by force and in an institutional setting where the record does not clearly demonstrate "cloistered", residential privacy interests. *Pruett v. Texas*, *supra*.

3. Alternatively, the Texas state court was not bound by the three-judge District Court decision in *Buchanan v. Batchelor*, *supra*, because (a) they are coordinate courts and (b) the Federal Court decision was subsequently vacated by the Supreme Court and remanded. *Pruett v. Texas*, *supra*.

4. The constitutional right of privacy does not extend to protect one who commits the act of sodomy in a public place in an automobile [*Canfield v. Oklahoma*, *supra*] or in an abandoned warehouse

which, while out of view of others who are not present, is nonetheless accessible to them, as well, and without the privacy protections accorded to private residences. *Poe v. North Carolina, supra*.

People v. Onofre, supra, however, expressly relied (as to the privacy aspect of the ruling) on the fact that the act of Onofre occurred in his own private residence. The Court of Appeals emphasized, particularly, *Stanley v. Georgia*, 394 U.S. 557 (1969) [see *Onofre, supra* at 487]. The privacy right went so far as to protect "satisfaction of sexual desires by resort to material condemned as obscene by community standards *when done in a cloistered setting*" [*Onofre, supra* at 488; emphasis added; see, also, reference to the "cloistered personal sexual conduct of consenting adults" at page 485]. In *Poe*, by contrast, the asserted right to privacy was in a fact context where, although the evidence tended to show that the act was "done in private" [*State v. Poe, supra*, 252 S.E.2d at 843], there was no indication that either of the participants had any special rights to use of the premises or that others did not have equal access thereto. *Poe* appeared to be arguing as a trespasser of the warehouse premises. This Court would surely not extend to *Poe*'s abandoned warehouse the constitutional right of possession of obscene materials which would have been accorded to him in his own home. *Cf. Stanley v. Georgia, supra*.

The conclusions stated here are supported by this Court's comments in *Carey v. Population Services*, 431 U.S. 678 (1977) (decided after all of the above decisions except *Poe v. North Carolina, supra*) to the effect that the Court had not yet answered definitively the "difficult question" of the extent of constitutional protection available to private consensual sexual behavior of adults. *Id.* at 688, n. 5 and at 694, n. 17. Six justices of the

Court seemingly accepted this statement of the situation [see analysis at *Baker v. Wade, supra*, 553 F.Supp. at 1138], with the dissent expressly stating the contrary view [see *Baker v. Wade, id.*, n. 46].

The New York Court of Appeals was free to consider the issues in *Onofre* on the merits. Its decision striking down the statute in its entirety accorded to respondent Butler in her subsequent prosecution the right to a dismissal of the dependent loitering charge.

POINT III

There is no rational basis to reverse the Court of Appeals' holding in *Uplinger-Butler*, below, once the correctness of *Onofre* is recognized.

Respondent adopts the argument of respondent Uplinger in his Brief on this matter (Uplinger Brief, pages 11-13). Respondent further urges that the dissent of Judge Jasen in the Court of Appeals' decision (Petition, 3b-12b) fails to raise substantial arguments to the contrary.

First, the fact that the statute was "designed to protect persons from being harassed" [Petition, 3b] begs the question. It is the fact that no proof of harassment or annoyance was required that makes the loitering law, with its First Amendment implications of free speech and assembly, invalid in the first place. The majority clearly reserves to the Legislature the power to enact an appropriately limited statute to meet any risk of harassment or offensiveness (Petition, 2b-3b). The Legislature's right to "regulate public conduct" [Petition, 3b], however, is not unlimited simply because the conduct is in public; the First, Fifth and Fourteenth Amendment protections must be adhered to.

Whether or not Judge Jasen has correctly characterized respondent Butler's conduct [see Petition, 7b], the claimed policy interests of the State, with respect to her and others in similar circumstances, can be fully vindicated by prosecution under Penal Law, Section 240.37, or by prosecution under new legislation which the Legislature could pass controlling public sexual activity.

The fundamental flaw in the dissent's position, however, is the assertion that there was "no necessity that the statute require the conduct proscribed to be offensive or annoying to others" and that it is enough if the Legislature determine "that public solicitation to engage in sexual conduct is necessarily offensive to others" (Petition, 5b). Respondent submits that a mere legislative finding as to the offensiveness of public solicitation has never, without more, been enough to support the statute and avoid constitutional implications.⁶ That a more restricted legislative structure is required, and that it is possible to establish, is demonstrated by limiting statutory constructions adopted in analogous situations by California [*Pryor v. Los Angeles Municipal Court*, 25 Cal.3d 238 at 256-257, 599 P.2d 636 at 647 (1979)] and Massachusetts [*Commonwealth v. Sefranka*, _____ Mass. _____, 414 N.E.2d 602 at 608 (1979)].

⁶ One could argue, for example, that religious solicitation or street preaching is frequently actually offensive to other users of the public streets. While sexual solicitation would undoubtedly not enjoy the degree of protection that public preaching and solicitation of alms would, the context is critical. What was the relationship, if any, of the parties? Who was present who could be anticipated to be offended or alarmed? What time of day or night was it? Where did the contact occur as among relative public places—on a crowded subway or in a remote, unpopulated, albeit technically public area. As with all sexual communications, there is ample room for reasonable regulation of conduct [compare *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 at 750-751 (1978)].

The argument of the dissenter below that overbreadth has necessarily been relied upon and erroneously utilized is incorrect. The basic holding of the majority was that since the consensual sodomy law was no longer in force and, as a result, the "purpose of engaging . . . in deviate sexual intercourse" [N.Y. Penal Law §240.35-3] was no longer unlawful, there was no basis for upholding a statutory prohibition against solicitation for that lawful act, where the prohibition incorporated no requirement of proof of the manner in which the solicitation was made (Petition, 2b). Overbreadth, as an argument, was not a necessary foundation to that holding, as clearly stated by the majority (Petition, 2b-3b).

Finally, it should be noted that the Court below has carefully and conservatively preserved to the Legislature the power to enact appropriate safeguards against offensive public sexual conduct, whether of performance of sex or solicitation therefor. See *People v. Uplinger-Butler*, Petition, 2b-3b; *People v. Onofre*, *supra*, 51 N.Y.2d at 490.

POINT IV

Even if the New York Legislature fails to take the opportunity to frame new statutory provisions regulating sexual conversation or public action in constitutionally acceptable terms, persons alleged to be in the position of respondent Butler will be subject to prosecution under Penal Law §240.37; the State has, to that extent, lost nothing by the decision below.

New York Penal Law, Section 240.37, prohibits loitering for the purpose of prostitution [see text at "Relevant Statutes", *supra*]. The statute carefully prescribes standards to guide the police officer,

prosecutor and court in the handling of such situations. It has been upheld by the New York Court of Appeals. *People v. Smith*, 44 N.Y.2d 613 (1978). As to the alleged conduct of respondent Butler, therefore [see Jasen, J., dissenting, Petition at 7b], the present Petition presents a frivolous issue, not sufficiently substantial in its impact on the State of New York to warrant review by this Court. If the only case here involved were that of respondent Butler, it would be clear that this Court should not grant the certiorari application.

POINT V

If, however, this Court elects to grant the certiorari application, opportunity should be accorded to the parties for full briefing and argument, due to the important and far-reaching impact of any decision this Court would render.

Respondent submits that this is an important case, as evidenced by the extent of litigation it has engendered [see Uplinger Brief, 10, 14], the numbers of people potentially affected by statutes similar to New York's consensual sodomy law [Penal Law §130.38] and loitering law [Penal Law §240.35-3]⁷ and the fundamental liberty issues involved. This is not a case where the issues are presented in a procedural context [cf. *Doe v. Commonwealth's Attorney, supra*] or factual context [cf. *Pruett v. Texas, supra*, *Canfield v. Oklahoma, supra*, and

⁷ New York's statutory provisions apply to males and females, homosexual and heterosexual conduct. In the social atmosphere of the 1980's, it is clear that the conduct sought to be prohibited involves sex acts and overt or subtle communications of literally millions of people. Compare *Baker v. Wade, supra* at 1129, dealing with a Texas statute directed at such conduct by homosexuals only and very large numbers of persons affected by the prohibitory scheme.

Poe v. North Carolina, supra] which would warrant summary disposition of the issues before this Court on the merits. If the Court deems the matter important enough to justify the grant of the certiorari writ, respondent urges that the appeal be handled thereafter in a full, plenary manner, which will adequately clarify the issues for the guidance of lower courts, prosecutors and defense counsel in the handling of future consensual-sex criminal issues.

Conclusion

The petition for certiorari should be denied. If the Court grants the requested writ, full argument and briefing of the issue is warranted.

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Respectfully submitted,

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